No. 09-311

In the Supreme Court of the United States

HCA HEALTH SERVICES OF OKLAHOMA, INC., d/b/a OU MEDICAL CENTER d/b/a CHILDREN'S HOSPITAL, and OU MEDICAL CENTER,

Petitioners,

v

NATHAN SHINN, a minor, by and through his parents, BRITTANY SHINN and BRANDON SHINN, and BRITTANY SHINN and BRANDON SHINN,

Respondents

On Petition for a Writ of Certiorari to The Oklahoma Court of Civil Appeals

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Constitution forbids use of the judicial process to deprive a litigant of property, unless the decisionmaker is impartial and the litigant receives fair notice and a full and fair opportunity to present a defense. As we explained in the petition, HCA was denied these protections and instead was subjected to severe sanctions—ultimately resulting in an $18 million judgment—by a judge who was deeply beholden to the lawyer for HCA's opponents, with no meaningful notice and no opportunity to present evidence in its defense.

Respondents paint a very different picture of the facts underlying the sanctions dispute and the facts giving rise to their injuries.[1] However, they do not dispute the facts that are central to this petition—that Judge Swinton's campaign was chaired by Mr. Durbin, that she issued a sanction of default judgment within hours of receiving respondents' motion, and that she did not consider a shred of evidence before terminating HCA's right to defend on the merits. Respondents' differing view of the propriety of the sanctions *in substance* underscores the importance of following appropriate *procedures* to resolve factual disputes and to determine whether and what kind of sanctions are justified.

[1] Respondents' suggestion that this Court should accept the state courts' characterization of the facts (Opp. 2 n.1) makes no sense in the context of a case in which the defendant challenges a sanction that required the jury (and the reviewing courts) to accept the allegations of the complaint at face value.

I. THE COURT SHOULD GVR FOR FURTHER CONSIDERATION IN LIGHT OF *CAPERTON*.

This Court has jurisdiction over the recusal issue and should GVR in light of *Caperton*, because the petition satisfies the standard set forth in *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam).

Respondents are mistaken in contending that pretrial review via a petition for writ of mandamus has a different effect on this Court's jurisdiction than pretrial review via an interlocutory appeal (see Opp. 15-17), that HCA failed to exhaust its federal claim even though it followed the Oklahoma-law mandamus procedure (see Opp. 18-19), and that *Caperton* would not have influenced the judgment of the Oklahoma Supreme Court (see Opp. 20-23).

A. This Court's jurisdiction extends to "all of the substantial federal questions determined in the earlier stages of the litigation." *Reece v. Georgia*, 350 U.S. 85, 87 (1955). It makes no difference what a state court names those stages or how the "[l]ocal rules of practice" are structured, because otherwise state courts would be able to "bar this Court's independent consideration" by crafting idiosyncratic procedural hurdles. *Urie v. Thompson*, 337 U.S. 163, 172 (1949).

Oklahoma law provides that a party challenging a judge's impartiality before trial must seek a writ of mandamus from the Oklahoma Supreme Court. *Pierce v. Pierce*, 39 P.3d 791, 796 (Okla. 2001); Pet. 6, 14-15. Respondents contend that the mandamus procedure is a mere sideshow and that parties must raise the same arguments on direct appeal if they wish to preserve them for review by this Court.

However, neither the Oklahoma Supreme Court nor this Court treats mandamus as a distinct case divorced from the underlying dispute

The Oklahoma Supreme Court views mandamus as a stage of the overall litigation That is why denials of mandamus are governed by the doctrine of law of the case rather than *res judicata* *Miller Dollarhide, P C* v *Tal*, 174 P 3d 559, 563 n 11 (Okla 2006) It also is why, for the mandamus petition at issue here, the Oklahoma Supreme Court's online docket identifies the district court decision as the opinion under review [4]

Likewise, this Court has characterized mandamus as a form of "interlocutory review" *Pac Union Conf. of Seventh-Day Adventists* v *Marshall*, 434 U S 1305, 1307 (1977) That makes sense, because several states employ mandamus and other writs for interlocutory error correction The California courts, for example, employ writs of mandate for interlocutory review in a wide range of circumstances See *Maine* v *Superior Court*, 438 P 2d 372, 378-379 (Cal 1968) Although such proceedings invariably carry a different caption, they are still part and parcel of the main case

B HCA properly preserved its federal constitutional claim for this Court's review As we explained in the petition (at 14-15), Oklahoma law provides two alternatives for a party seeking to disqualify a trial judge After the aggrieved party requests recusal and appeals to the chief judge, "the alleged error may

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[4] *Shinn* v *Swinton*, No PR-103926 (Okla Oct 27, 2006) http://www oscn net/applications/oscn/GetCaseInformation asp?number=103926&db=Appellate&submitted=true

be raised by a mandamus proceeding *or* in a subsequent appeal." *Pierce*, 39 P 3d at 796. There is no dispute that HCA fully exhausted mandamus review. Thus, because the mandamus proceeding was an earlier stage of the litigation, a GVR order is justified if there is a "reasonable probability" that the Oklahoma Supreme Court would resolve the mandamus petition differently under *Caperton* v. *Lawrence*, 516 U.S. at 167.

Respondents' contention that HCA could have reraised the issue—after it had already been fully preserved through mandamus—has no bearing on *this* Court's jurisdiction. At most, it implicates the procedures that the Oklahoma courts will employ on remand. In any event, Oklahoma appellate courts "may review claims which relate to alleged deprivations of due process of law despite a failure to preserve error." *Patterson* v. *Beall*, 19 P.3d 839, 841 (Okla. 2000). Thus, there is every reason to believe that a GVR order would result in effective review of the *Caperton* issue.[1]

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[1] Respondents rely on *Miller-Dollarhide* for the principle that the denial of mandamus is not necessarily a binding decision on the merits of the underlying dispute. Opp. 17. In that case, the petitioner simultaneously sought mandamus in the Oklahoma Supreme Court and a direct appeal in the Court of Civil Appeals, a fact of which the Oklahoma Supreme Court was "well aware." 174 P.3d at 564. No argument was held, an order was issued without dissent, and the supreme court concluded that its denial did not preclude the petitioner from continuing its direct appeal because the existence of "other adequate remedies at law" was a basis for denying mandamus. *Ibid.* Here, in contrast, there was no parallel proceeding, and the Oklahoma Supreme Court heard argument, issued an order to clear any procedural obstacles (Pet. App. 66a), and then denied mandamus.

C. Contrary to respondents' suggestion, *Caperton* is directly implicated by the decisions below. Respondents downplay their lead counsel's role in chairing Judge Swinton's campaign (Opp. 19-23), but the full story shares the key characteristics of *Caperton*. Mr. Durbin was co-chairman of Judge Swinton's campaign when she first ran for election in 2002. Opp. App. 5a. That race was contentious and required the judge's campaign team to engage in "a lot of last minute fundraising" to neutralize $150,000 in independent expenditures by "a person that was not a candidate in the race" (*id.* at 4a), a stunning amount for a state trial-court judgeship. In anticipation of another contentious election, Judge Swinton appointed the same campaign team for her reelection bid. *Id.* at 5a. After she lined up her allies for a renewed battle, no opponent materialized. *Ibid.* However, the absence of the anticipated opponent by no means neutralizes the fact that Judge Swinton and Mr. Durbin share a relationship of trust, loyalty, and reliance—attributes that are inconsistent with norms of impartial adjudication.

Respondents argue that *Caperton* is not implicated because Judge Swinton was "*deemed* reelected" on June 7, 2006, such that the recusal motion postdated Mr. Durbin's active duties as campaign chairman. Opp. 7, 22. Not so. The complaint was filed in July 2005, so Judge Swinton most certainly presided over the case while her reelection campaign, chaired by Mr. Durbin, was ongoing. Moreover, in *Caperton* itself, the campaign had ended by the time the West Virginia Supreme Court of Appeals resolved the case

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over a dissent. In such circumstances, pursuing identical relief would have been futile.

Otherwise, the newly elected judge would not have been on that court to cast the deciding vote.

Finally, respondents' suggestion that the Oklahoma courts anticipated *Caperton* (Opp. 19-20) is mistaken. To be sure, the Oklahoma courts have recognized the uncontroversial principle that recusal is required where "impartiality might reasonably be questioned." *Pierce*, 39 P.3d at 797. But *Caperton* specifically held that due process is violated "when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by * * * directing the judge's election campaign when the case was pending or imminent." 129 S. Ct. at 2263-2264. That circumstance is mirrored with precision by Mr. Durbin's participation in this case while he chaired Judge Swinton's campaign. Indeed, it is quite possible that reassembling the team that engaged in "a lot of last minute fundraising" for the judge's prior campaign is what scared off any challengers and allowed her to be "deemed reelected." At the absolute minimum, the parallels satisfy *Lawrence*'s requirement that there be a "reasonable probability" that the Oklahoma courts would reconsider their judgment. 516 U.S. at 167.

II. THE COURT SHOULD GRANT CERTIORARI TO ADDRESS THE SAFEGUARDS THAT MUST BE AFFORDED PARTIES BEFORE THE IMPOSITION OF SEVERE SANCTIONS.

In the alternative, plenary review is warranted to provide needed guidance on the procedures that must precede the imposition of severe, pretrial sanctions. In approving the sanction of a directed judgment as to liability, the Oklahoma courts denied

HCA two fundamental due process rights that other courts have guaranteed: the right to "particularized" notice of the alleged misconduct and the possible sanction to be imposed therefor, and the opportunity to mount a factual defense by submitting evidence to the sanctioning court.

Although respondents insist that "due process is flexible" (Opp. 23 (quoting *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972)), both of these issues implicate bright-line rules. Under HCA's view—and that of many courts (see Pet. 18-24)—the Due Process Clause requires particularized notice and the opportunity to submit evidence, regardless of the nature of the conduct underlying the sanctions. These issues are squarely presented in this case.

Contrary to respondents' contention (Opp. 30-31), these procedural safeguards would have made a difference here. If the district court had provided sufficient notice and had accepted HCA's request to present evidence (Pet. App. 101a), it would have learned that HCA made substantial and timely[1] productions of the documents that existed and that many documents that the court and respondents condemned it for failing to produce did not exist. Although *neither* party was perfect in its compliance with discovery rules, the evidence would have shown that any violations by HCA were too minor to justify the draconian sanctions of a directed judgment on

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[1] Respondents' contention that HCA was already delinquent in supplementing discovery by the time of the recusal stay (Opp. 29 n.18) is misleading. When the trial court ordered HCA to supplement its discovery, the court deferred judgment on HCA's motion to strike the discovery order. HCA was under no obligation to complete its production until that motion was resolved.

liability and a jury instruction informing the jury that HCA had committed perjury

Moreover, respondents are flatly wrong in denying the existence of the two mature splits identified in the petition

A The lower courts are divided on whether particularized notice is a prerequisite to the imposition of sanctions Although respondents dispute the division, the Eighth Circuit has specifically noted that the "[c]ourts are split" *Jensen* v *Fed. Land Bank*, 882 F 2d 340, 341 (8th Cir 1989) In arguing otherwise, respondents make two errors *First*, without any reasoned basis, they exclude the numerous cases that have recognized a "particularized notice" requirement in the context of sanctions imposed for reasons other than discovery misconduct Opp 25 *Second*, they invoke cases saying that courts need not warn parties that continued disobedience will result in sanctions, in a misguided effort to suggest that the cases holding that courts must provide particularized notice of the already completed conduct for which sanctions are being contemplated mean other than what they say Opp 26-27

1 Respondents implicitly concede that several federal courts of appeals and state courts of last resort have held that the Due Process Clause requires particularized notice prior to the imposition of sanctions under FED R CIV P 11, FED R APP P 38, FED R BANKR P 9011, 28 U S C § 1927, and a court's inherent powers Compare Opp 24 with Pet 18-19 They contend that these cases don't count, however, and that, in the context of discovery sanctions, we cite only one case requiring particularized notice (*Ohio Furniture Co* v *Mandala*, 488 N E 2d 881 (Ohio 1986) (per curiam)), which they further

contend did not rest on the Due Process Clause They are mistaken in both respects

First, respondents err in contending that discovery sanctions are different because, in that context, "the court has informed the party of its violations and ordered it to comply " Opp 24 Unless the order requires a discrete act—like providing a key to the warehouse—a party that supplements its discovery in response to a court order cannot begin to predict whether its response will be deemed inadequate A discovery order may impose obligations, but it does not provide the kind of particularized notice of the conduct for which sanctions are being contemplated that is essential to preparing a defense any more than the existence of Rule 11 provides the notice necessary to enable a party to defend itself in that context Accordingly, the distinction respondents draw between discovery and all other contexts in which sanctions may be imposed is untenable, and the split to which we pointed (Pet 18-19) is both real and deep

Second, there *is* a split of authority even in the narrow context of discovery sanctions The Utah Supreme Court has required particularized notice in that specific context *See Kilpatrick* v *Bullough Abatement, Inc* , 199 P 3d 957, 965-967 (Utah 2008) Moreover, in reaching the same result, the Ohio Supreme Court relied upon the "due process guarantee of prior notice " *Mandala* 488 N E 2d at 883 Because due process under Ohio law is coextensive with the federal constitutional right (*Direct Plumbing Supply Co* v *City of Dayton*, 38 N E 2d 70, 72 (Ohio 1941)), respondents' effort to slough off *Mandala* as a state-law holding is misguided

2 Respondents cite various cases in which courts have disavowed the need to issue a "warning" before conduct becomes sanctionable Opp 26-27 & n 15 But a warning is not the same as particularized notice The former *precedes* a violation and advises the warned party to alter its behavior The latter *follows* an alleged violation and allows the accused party to prepare its defense The cases cited by respondents demonstrate that courts treat particularized notice and warnings as different things For example, in *Malone* v *U S Postal Service*, 833 F 2d 128, 133 (9th Cir 1987), although the Ninth Circuit found "a warning to be unnecessary," 40 days passed between notice of the alleged violation and the subsequent sanction Likewise, in *FDIC* v *Daily*, 973 F 2d 1525 (10th Cir 1992), 34 days elapsed between the motion for sanctions and imposition of the penalty Thus, these cases do not support respondents' suggestion that the Ninth and Tenth Circuits would countenance affording a party only minutes of advance notice before imposition of sanctions

In sum, the courts are divided on whether a party facing sanctions must be afforded advance notice of the specific allegations with sufficient time to prepare a defense Because this issue arises with frequency and can—as happened here—result in severe, unjustified sanctions, this Court's review is warranted

B Lower courts also are divided on whether a party facing sanctions is constitutionally entitled to submit evidence in its defense through written briefing or an evidentiary hearing Pet 21-24

Respondents again attempt to narrow the scope of the division to the context of *discovery* sanctions (Opp 28), as before, that limitation is artificial[5] As this Court has recognized, "[t]he due process concerns posed by an outright dismissal are plainly greater than those presented by assessing counsel fees against lawyers" *Roadway Express, Inc* v *Piper*, 447 U S 752, 767 n 14 (1980) Decisions requiring *greater* process for *lesser* sanctions most certainly reflect a schism between the lower courts

Moreover, although respondents identify no authorities adopting their proposed distinction between discovery sanctions and other sanctions, this Court has suggested that the *same* rules apply In drawing a comparison between "outright dismissal" and "counsel fees" in *Roadway Express*, this Court applied a case involving discovery sanctions to Rule 11 447 U S at 767 n 14 (citing *Societe Internationale pour Participations Industrielles et Commerciales, S A* v *Rogers* 357 U S 197, 208-212 (1958)) Thus, respondents' suggestion that discovery sanctions and other sanctions should be treated differently is mistaken

Courts have adopted a variety of positions in analyzing the due process requirements for litigation sanctions Some courts have required that the party threatened with such sanctions be afforded a full-on evidentiary hearing, others have mandated at least

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[5] And as before respondents characterize a constitutional decision as one of state law In *Doulamis* v *Alpine Lake Property Owners Ass'n*, 399 S E 2d 689, 693 (W Va 1990), the court required an evidentiary hearing because it correctly recognized that the applicable rules were subject to "constitutional limitations"

the opportunity to provide a written response,[6] and certain courts (like the courts below) have essentially eviscerated the opportunity to respond. This Court's review is warranted to determine which approach is constitutionally correct.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[6] Respondents deny that courts have required that a party threatened with sanctions be given the opportunity to make a written response. Opp. 27-28. To be sure, the cases cited in the petition deem a written response *sufficient* to satisfy due process, rather than *necessary*. But that is only because they recognize that *greater* procedures could obviate the need for a written response. These cases certainly stand for the proposition that the right to respond must be meaningful, which for HCA it unambiguously was not.

Respectfully submitted

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OCTOBER 2009